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IN THE

# Supreme Court of the United States

**October Term, 1979**

No. 79-1365

DEPARTMENT OF ENERGY AND CHARLES W. DUNCAN, JR., SECRETARY OF ENERGY,

*Petitioners,*

v.

MOBIL OIL CORPORATION,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### Questions Presented

The fundamental question raised in this case is whether the predecessor agency of petitioner, Department of Energy ("DOE"), may amend a regulation without regard for statutorily mandated rulemaking procedures and with no consideration of (i) the statutory objectives the regulation must achieve, (ii) the effect of the regulation on the industry, or (iii) any alternatives to the policy adopted in the regulation. Applying settled principles of administrative law which have been endorsed by this Court and affirming the decision of the United States District Court for the Eastern District of Texas, a unanimous panel of the Temporary Emergency Court of Appeals ("TECA") held that the agency has no such power.

The question arises with respect to an April 30, 1974 amendment to the Mandatory Petroleum Price Regulations which required respondent Mobil Oil Corporation ("Mobil") to absorb millions of dollars of actual costs incurred in acquiring crude oil. The specific questions raised by the petition are:

(1) Whether the court of appeals erred in finding that the agency's complete failure to consider the statutory objectives before promulgating the April 30, 1974 amendment rendered the amendment legally deficient.

(2) Whether the court of appeals erred in finding that there was no good cause justification for the agency's admitted failure to follow statutorily mandated rulemaking procedures.

(3) Whether, on the particular facts of this case, the court of appeals erred in finding that the April 30 amendment was not validly reestablished *sub silentio* by subsequent rulemakings involving other regulatory issues and in which the agency never considered either the rule adopted on April 30 or the policy implications of that rule.

(4) Whether, on the particular facts of this case, the court of appeals erred in failing to find that the April 30 amendment was a continuation of a previous rulemaking proceeding, even though the agency did not so argue in the courts below and even though the record reveals that during the prior rulemaking the agency never considered or intended to adopt the rule set forth in the April 30 amendment.



## Statement of the Case

The facts of the case are set forth in the opinion of the court of appeals.[1] In light of the new arguments advanced in the petition, however, we amplify below the nature and significance of the regulatory amendment at issue as well as the scope of TECA's decision.

### A. The Refiner Price Rules Before the April 30 Amendment.

The predecessors of the refiner price rules involved in this action were promulgated by the Cost of Living Council ("CLC") pursuant to the Economic Stabilization Act of 1970 ("ESA") as amended, 12 U.S.C. § 1904 note. 38 Fed. Reg. 22536 (Aug. 22, 1973). Those rules generally allowed a refiner to increase its prices by the "passthrough" of increased "product costs" (cost of crude oil and purchased product), allocating those costs to the regulated or "covered" products. Covered products were divided into two categories: 1) "special products" and 2) "covered products other than special products." Under the general rule, costs were computed as an aggregate which a refiner could allocate as it chose among individual products in the "other than special products" category.[2] Costs not passed through currently could be held available ("banked") for use in future months.

After enactment of the Emergency Petroleum Allocation Act ("EPAA")[3] and the transfer of CLC functions to the Federal Energy Office ("FEO"), the FEO repromulgated

1. The opinion is set forth as Appendix C to the petition at pages 18a—38a. (hereinafter "Pet. App.") "R." citations are to the Joint Appendix filed in the court of appeals.

2. The only exception to that rule required product cost increases to be attributed to each "special product" in an amount proportionate to the sales volume of that product.

3. Pub. L. No. 93-159, 87 Stat. 628 (1973) (present version at 15 U.S.C. §§ 751, *et seq.*).

the refiner pricing regulations on January 14, 1974, expressly retaining the pricing provisions adopted by CLC[4]. *See* 38 Fed. Reg. 34414 (1973); 39 Fed. Reg. 744; 39 Fed. Reg. 1924 (1974).

The January 14, 1974 regulations were adopted under the authority of both the EPAA and the ESA. Since the ESA extended to all petroleum products, the "covered products" to which the regulations applied included not only refined petroleum products but also the residue of the refining process such as petroleum coke. Petroleum coke is the residue which remains after secondary refining of crude oil in "coker units", a process which increases the yield of gasoline and distillates by as much as twenty percent.[5]

Since petroleum coke is comparable in value to coal rather than other petroleum products, it cannot be sold at a price which supports cost increases proportionate to its percentage of a refiner's sales. This had no significance while petroleum coke was a "covered product other than a special product" because increased costs could be recouped on the other products in that category. Even if cost increases in the "other than special products" category could not be recovered in a given month, they could be "banked" for later use.

Upon the expiration of the ESA on April 30, 1974, the FEO's authority was limited to the products covered by the EPAA—crude oil, residual fuel oil and refined petroleum products. In anticipation of that expiration, on

4. *See* 10 C.F.R. Part 212, Subpart E, 39 Fed. Reg. 1952 (Jan. 15, 1974).

5. Mobil makes extensive use of coker units and is by far the largest domestic producer of petroleum coke. Most of this residue has historically been suitable for mixing with coal, to be burned as fuel by electric utilities. Petroleum coke thus competes with coal rather than other petroleum based sources of energy and on a volumetric basis its value has no relationship to that of the primary products of the refining process.



April 3, 1974 the FEO amended the definition of "covered products", exempting certain products which, because they were not "refined petroleum products," the agency no longer had the authority to regulate. The products exempted were petroleum coke, petroleum wax, road oil, asphalt and refinery gas. 39 Fed. Reg. 12353-54 (April 5, 1974). The only effect of the April 3 amendment on the pricing formula was the reduction in the number of covered products. With the continued exception of special products, all product cost increases were still computed as an aggregate which a refiner could allocate as it chose among covered products.

**B. The Refiner Price Rules After the April 30 Amendment.**

Statutory decontrol presented the agency with a number of policy options respecting the cost apportionment formula and the effect of decontrol upon cost recovery, including whether any costs should be allocated to the decontrolled products and, if so, how. The FEO did not engage in a public rulemaking proceeding regarding these issues but further amended its regulations without notice or opportunity for comment when the ESA expired on April 30, 1974. The amendment required that a portion of increased crude oil costs corresponding to the volume of exempt products sold must be allocated to those products. 10 C.F.R. § 212.83(c)(2), 39 Fed. Reg. 15139 (May 1, 1974). The increased costs thus allocated could only be recovered in the prices charged for the exempted products.

For the first time the regulations prohibited the pass-through of all product cost increases in the prices of covered products. Increased costs now had to be directly attributed to a new category—products exempted on April 3, 1974—and could be recovered, if at all, in sales of those products.

**C. The Impact of the April 30 Amendment.**

The April 30 amendment required a refiner to apportion increased costs between controlled products and those exempted on April 3 on the basis of volume. Since the exempt products are not refined petroleum products, their value is not comparable to that of an equivalent volume of the primary products of the refining process such as gasoline. They therefore cannot be sold at prices which permit recovery of the costs which had to be allocated to them under the April 30 amendment. In the case of petroleum coke, for example, Mobil would have had to sell that product at three times the price at which it was actually sold in order to have completely recovered the costs required to be allocated to it. Pet. App. 6a.

The comparatively low prices for petroleum coke were of no practical significance when it was a "covered product other than a special product" because increased costs could be shifted to prices of other products in the same category. The April 30 amendment, however, resulted in cost underrecovery and required Mobil to absorb over 75 million dollars of the increased crude oil costs it had to allocate to petroleum coke in 1974 and 1975 alone. Pet. App. 23a n.4.

**D. The Proceedings Below.**

Because it believed that the agency could not have intended to discourage the use of coker units which increase refinery yield, Mobil sought administrative relief pursuant to provisions which permit the agency to except a firm from the operation of a regulation which results in serious hardship or gross inequity. Declining to consider the "significant" policy issues concerning the rule's impact on national energy objectives, the agency denied Mobil's application and its appeal from that denial. Pet. App. 6a-7a. After the agency subsequently granted another refiner the relief Mobil had sought, Mobil reapplied and relief was again denied. Pet. App. 7a-8a. Having exhausted all administrative avenues, Mobil brought this action.



Discovery in the district court focused upon the agency's action in promulgating the April 30 amendment and sought explication of the reasoning and consideration underlying that amendment. The record revealed that the only documents relevant to the April 30 amendment were the *Federal Register* publication of April 30 and a draft of that publication dated the same day which the agency declined to produce. R. at 43, 52. The record also revealed that the agency had not considered the effects of the April 30 amendment. The agency admitted, for example, that it had never considered how the amendment would affect the recovery of increased crude oil costs in sales of petroleum coke or other residue of the refinery process. R. at 56. The agency also stated that it had not considered the amendment's effect upon the supply of refined petroleum products or the ability of refiners to increase that supply by use of coker units. R. at 97. Although the amendment apportioned costs to refinery residue on a volumetric basis, the agency admitted that it had never considered the amendment's impact upon the price of, supply of, and demand for petroleum coke. R. at 36. Finally, the agency stated that it had failed to consider any alternatives to the cost allocation method adopted in the April 30 amendment. R. at 96.

Upon cross-motions for summary judgment, the district court granted judgment in favor of Mobil, finding the April 30 amendment procedurally and substantively invalid. The court held that, as revealed by the record, the agency had failed to consider the factors relevant to lawful rule-

making—in this instance, the statutory objectives of the EPAA which Congress directed the agency to achieve "to the maximum extent practicable." *See* 15 U.S.C. § 753(b)(1). Pet. App. 10a. The court also held that, as evidenced by the substantial cost absorption imposed upon Mobil, the amendment did not provide a reasonable mechanism allowing a dollar-for-dollar passthrough of increased crude oil costs as required by the statute.[6] App. 11a. The court similarly rejected the agency's argument that the imminent expiration of the ESA constituted "good cause" for its failure to observe rulemaking procedures. Based upon the uncontroverted record, the court held that "the agency was aware well in advance that the Act would expire and had ample opportunity to provide notice", and was not "free to delay formulation of such an amendment until the last moment and then invoke the 'good cause' exception." Pet. App. 12a. The court reasoned alternatively that since the April 30 amendment was a policy decision not required by the expiration of the ESA, that Act's expiration could not justify the violation. Pet. App. 12a. The district court also rejected the agency's *post hoc* assertion that the rule was interpretive and therefore not subject to statutory rulemaking procedures. Pet. App. 12-13a. Finally, finding that "Mobil was uniquely penalized under the regulation by virtue of its attempts to increase refinery yields through use of coker units" (Pet. App. 13a), the court found that the denials of Mobil's requests for exception relief were arbitrary, capricious and unsupported by substantial evidence. Pet. App. 13a-14a.

Upon appeal, TECA declined to decide whether the amendment violated the dollar-for-dollar passthrough provision of the EPAA or whether the denials of Mobil's exception requests were proper. Finding that "it is clear from the record that at no time prior to promulgating the

6. *See* 15 U.S.C. § 753(b)(2)(A).



April 30, 1974 amendment did the DOE even consider the relevant factors or objectives set out in § 753(b)(1)," a unanimous panel of the court of appeals affirmed the district court's holding with respect to the substantive invalidity of the April 30 amendment. Pet. App. 28a. Regarding the agency's failure to comply with the Administrative Procedure Act, TECA exercised its "duty . . . to scrutinize the record to ascertain whether in fact an exception [to the rulemaking requirements] did exist". Pet. App. 34a. The court found that "none of the reasons advanced by the agency supports a finding of good cause" and that the amendment was not interpretive. *Id.* When TECA declined to review those findings on rehearing, the agency brought its petition to this Court.

## Reasons for Denying the Petition

The decision below does not announce a novel rule of law, address a question of first impression or implicate any of the considerations which normally warrant review by certiorari. Petitioners do not claim otherwise, contending instead that review is appropriate because the decision was incorrect and might permit substantial amounts of refiners' costs to be used to increase prices of motor gasoline. As shown below, the decision of the court of appeals, the monetary consequences of which have been mischaracterized by petitioners, was founded upon settled principles of law and does not warrant review.

Contrary to the impression created by petitioners, the decision below did not strike down the agency's cost-allocation formula. Pet. 2. The regulation at issue apportioned costs on the basis of volume to the residue of the refining process, products which are not "refined petroleum products" and which do not have a value equivalent to that of the

primary objects of the refining process. As a result, Mobil was required to absorb millions of dollars of costs, primarily because it furthered national energy objectives by increasing refinery yield. Expressly emphasizing that its decision was based on "narrow grounds" (Pet. App. 38a, 25a), the court below found the amendment void because of the agency's rulemaking violations but otherwise left the regulatory system and the cost-allocation formula intact.

Rather than conflicting with the decisions of this Court or the other courts of appeals, the decision below falls squarely within the mainstream of settled administrative law. Indeed, the only real questions raised in the petition do not involve legal principles but turn upon the particular facts of this case. Since TECA's decision is dependent upon the facts attending the April 30 amendment, the issues decided below will not recur. Notwithstanding, petitioners seek to have this Court embark upon "a journey through the intricate labyrinth known as the DOE regulations"[7] in search of that which two courts were unable to find—proof that the agency actually considered the statutory objectives in promulgating the April 30 amendment and proof that the agency's admitted disregard of rulemaking procedures was justified by good cause. This Court has previously noted that certiorari is not warranted to review such factual issues. *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). Application of that rule is particularly appropriate where, as here, the findings of fact of the district court have received the unanimous concurrence of the court of appeals. In such cases, this Court's review is normally withheld "in the absence of a very obvious and exceptional showing of error." *Graver Mfg.*

7. *Grigsby* v. *DOE*, 585 F.2d 1069, 1073 n.8 (TECA 1978), *cert. denied*, 440 U.S. 908 (1979).



*Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949).[8] Review by certiorari here is particularly unwarranted since TECA is a court vested with nationwide jurisdiction which has developed unique expertise in applying the complex regulations at issue and, as shown below, its findings were compelled by the record.

## I.

## The April 30 Amendment Was a Policy Decision of the Agency, Not a Necessary Corollary to Prior Regulations

Petitioners seek to portray this case as presenting the question whether, having decided in a public rulemaking to adopt a rule, an agency may correct its inadvertent misstatement of that rule without further rulemaking or decisionmaking. Pet. 14-17. That question is simply not presented in this case. The rule adopted on April 30 was not proposed in December 1973 or adopted either on January 14 or April 3; petitioners do not contend otherwise. Instead, their position rests on a characterization of the April 30 amendment as an inexorable result of statutory decontrol—a "corollary" that was "necessary" to "carry forward the old formula" (Pet. 8, 18)—which was *sub silentio* intended in January but inadvertently omitted. The April 30 amendment, however, represented a substantial departure from the January 14 regulations. It required the direct apportionment of costs to refinery residue for the first time, reduced refiners' prior flexibility in cost apportionment and resulted in substantial cost absorption by

8. *See also Branti* v. *Finkel*, 48 U.S.L.W. 4331, 4332 n.6 (March 31, 1980); *Berenyi* v. *Inmigration Director*, 385 U.S. 630, 635 (1967); *Mobil Oil Corp.* v. *F.P.C.*, 417 U.S. 283, 310 (1974); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).

Mobil.[9] As both courts below held,[10] the amendment represented a policy decision implementing regulatory changes the agency wished to adopt in light of decontrol.

The ESA's expiration only required the decontrol of products not subject to regulation under the EPAA, an obligation the agency fulfilled on April 3. Deregulation presented the agency with a number of options, none of which was the inevitable result of decontrol. First, the agency might have determined that no costs are properly attributable to refinery residue, a view which several authorities support.[11] That determination would have permitted a firm, as a whole, to increase profits, a logical result of decontrol, and would have provided an incentive for increased refinery yield. This was the rule the agency adopted on April 3.[12]

Second, if it believed that certain costs should be attributed to refinery residue, the agency then was obliged to determine how that might fairly be accomplished in light of the lower value of the decontrolled products.[13] For

9. The agency itself had determined that the amendment's impact was sufficiently harsh to justify exception relief to another refiner, and the district court held that the failure to grant similar relief to Mobil was arbitrary. Pet. App. 13a.

10. Pet. App. 10a, 32a.

11. *See, e.g.*, A. MATZ, *et. al.*, COST ACCOUNTING, 696-724 (5th ed. 1972); M. SCHIFF and L. J. BENNINGER, COST ACCOUNTING, 329-50 (2nd ed. 1963).

12. Even if it is assumed that the agency never intended to adopt such a rule (Pet. 16), it was obliged to consider the statutory objectives respecting the policy which it claims it did intend to adopt (*i.e.*, the April 30 rule). Such a policy, as any rule, is subject to rulemaking. Certainly an agency's prior errors standing alone cannot justify its adoption of a new policy without regard for the statutory objectives or compliance with rulemaking requirements.

13. The agency itself now recognizes that "covered products" properly bear a greater than volumetrically proportional amount of costs. *See* 44 Fed. Reg. 15660 (1979) (greater than volumetric apportionment to gasoline under existing regulations).



example, it could have adopted a scheme which ensured that refiners could recover all of, but no more than, their costs. A third option, which the agency adopted on April 30, was the attribution of costs to the decontrolled products on a volumetric basis. Under that rule, decontrol had the anomalous effect of requiring refiners such as Mobil to absorb substantial costs.

Thus, petitioners' suggestion that the April 30 amendment was nothing more than a necessary correction of an inadvertent error is unsupportable. As the courts below correctly found, that amendment was plainly a substantive policy decision made pursuant to the agency's rulemaking powers. Pet. App. 10a, 32a.

## II.

## TECA Did Not Err in Finding that the April 30 Amendment Was Substantively Invalid

This Court has consistently held that, in exercising judicial responsibility to review agency action alleged to be arbitrary and capricious, a court is obliged to determine whether the agency based its decision on "a consideration of the relevant factors." *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971); *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 802-03 (1978). The court of appeals was plainly justified in applying this standard, Pet. App. 26a-28a, a fact which petitioners now appear to concede. Pet. 22. Nor do petitioners disagree with respondent or both courts below that the factors which, at a minimum, were relevant to the April 30 amendment were the nine statutory objectives which any EPAA

regulation must provide for "to the maximum extent practicable." 15 U.S.C. § 753(b)(1). *See* Pet. App. 27a-29a.

Petitioners contend, though, that TECA assumed the agency must give detailed consideration to each objective in all agency actions. Pet. 23. But that contention is mistaken, for TECA only held that, on the facts of this case, the agency's wholesale failure to consider and balance the statutory objectives as a whole rendered its action legally deficient. *See* Pet. App. 27-28a.[14]

Petitioners also take issue with TECA's factual finding that the agency did not consider the statutory objectives. That finding was compelled by the record, which overwhelmingly demonstrated that the agency had not only failed to consider relevant factors, it did not engage in any reasoned consideration whatsoever. *See* discussion *supra* at 7.[15]

14. Similarly, the district court did not hold that the agency must give detailed consideration to each objective. It held that the agency must "weigh" and "balance" the objectives. *See* Pet. App. 10a-11a.

15. Having not considered the April 30 amendment's impact on, for example, the supply of refined petroleum products (R. at 97), the agency could not argue that it considered the EPAA objective of "equitable distribution of . . . refined petroleum products." 15 U.S.C. § 753(b)(1)(F). Having not considered the impact of the April 30 amendment on refiners' ability to recover costs, or the price, supply of or demand for the products to which it apportioned costs (R. at 36, 56, 97), the agency could not have considered whether it minimized economic distortion, preserved an economically sound industry, or achieved economic efficiency. §§ 753 (b)(1)(D), (H), (I). Indeed, the agency does not and cannot argue that it fulfilled its statutory mandate to achieve these EPAA goals to the "maximum extent practicable" since it admitted that it never considered *any* alternatives to its action (R. at 96) let alone those which might accomplish the statutory objectives to a greater extent. Yet rulemakers must conduct "a considered evaluation of the presently available alternatives." *Pillai* v. *CAB*, 485 F.2d 1018, 1029 (D.C. Cir. 1973). Where the agency fails to consider alternatives to its action, that action is properly voided "as either an unsupported exercise of discretion or an arbitrary failure to exercise discretion at all." *Id.* at 1030.



TECA's task in determining whether the agency had in fact considered the statutory objectives was considerably eased by the agency's failure to assert that it had and its argument that it need not have done so. Indeed, even here, the agency has not affirmatively asserted that it ever engaged in such consideration, leaving to a footnote its contention that the stated purpose of the amendment was consistent with *one* objective.[16] In light of this record, TECA properly concluded that "it is clear from the record that at no time prior to promulgating the April 30, 1974 amendment did the DOE even consider the relevant factors or objectives set out in § 753(b)(1)" and that "[i]t is therefore readily apparent . . . that the agency neglected to fulfill its statutory command when it promulgated the amendment without considering the Act's objectives". Pet. App. 28a.[17] That factual finding does not warrant review by certiorari.

16. The agency argues (Pet. 24-25 n.19) that the one statutory objective it may have considered is that of achieving "equitable prices," referring to the preamble's statement that § 212.83 was amended "to insure that all of the increased cost of crude oil processed by a refiner is not allocated to covered products, which now constitute less than all of a refiner's production." 39 Fed. Reg. at 15139. However, the Conference Report on the EPAA indicates that equitable prices imply "an equitable balance between the sometimes conflicting needs of providing adequate inducement for the production of an adequate supply of product and of holding down spiraling consumer costs." H.R. CONF. REP. NO. 93-682, 93RD CONG., 1st Sess., *reprinted in* [1973] U. S. CODE CONG. & AD. NEWS 2688, 2703. *See also* Air Transport Ass'n of America v. Federal Energy Office, 382 F. Supp. 437, 445-46, 452 (D.D.C. 1974), *aff'd*, 520 F.2d 1339 (TECA 1975). Yet the agency has stated that no consideration was given to the impact of the amendment on the supply of refined petroleum products in the United States. *See* R. at 97.

17. Petitioners' statement that "the courts below erred in failing to identify a single relevant consideration that the agency arbitrarily failed to take into account" (Pet. 24) simply ignores the holdings and functions of both courts. TECA identified several of the

Finally, petitioners' statement that neither court below disagreed with the agency's view that the April 30 amendment was a "rational accommodation of the statutory goals" (Pet. 23), while technically correct, is misleading. Having found that the agency had failed to meet the threshold test of considering the statutory objectives, neither court had occasion to reach the question whether the amendment had a rational basis or presented a clear error of judgment. Had they been required to reach those questions, we submit that they would have found that a rule which volumetrically apportions costs among products whose values are not even remotely related on a volumetric basis is *per se* irrational. We also believe the courts below would have been compelled to find the rule invalid in light of the agency's own conclusion elsewhere that a rule which requires substantial cost absorption, as the April 30 rule did, contravenes the statutory objectives.[18]

## III.

## The Agency's Rulemaking Violations Do Not Merit Review By This Court

In *Chrysler Corp.* v. *Brown,* 441 U.S. 281, 303 (1979), the Court noted that to "assure fairness and mature consideration of rules of general application", "courts are charged with ... ensuring that agencies comply with the 'outline of minimum essential rights and procedures' set out in the APA." *Id.* at 313 (citation omitted). Applying

statutory objectives that the agency conceded were relevant but which the agency arbitrarily failed to consider. Pet. App. 27a—28a & n.16. The court's role came to an end upon that finding. Surely petitioners cannot contend that a court is obliged to prepare a further list of the agency's failings.

18. 41 Fed. Reg. 5116 (1976).



these principles, the courts below found the April 30 amendment void because of the agency's failure to follow required rulemaking procedures.

The agency contended that the April 30 amendment fell within the exception to 5 U.S.C. § 553(b) which applies "when the agency for good cause finds (*and incorporates the finding and a brief statement of reasons therefor in the rules issued*) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[19] This was the only exception invoked by the agency in promulgating the April 30 amendment; it stated that normal rulemaking procedure is "impracticable"[20] and that "good cause exists" solely "[b]ecause the purpose of these amendments is to provide immediate guidance and information...." 39 Fed. Reg. 15139. TECA held first that this stated justification was inadequate.[21] Then, going beyond the agency's contemporaneous explanation and examining the facts surrounding the April 30 amendment, TECA found that there was no factual basis for a finding of "good cause."

The only other justification the agency offered to TECA was the imminent expiration of the ESA, but, as TECA found, "the record clearly shows that ... [t]he expiration of

19. The italicized language was omitted in petitioners' quotation of the statutory exception. Pet. at 18.

20. Contrary to the statement in the petition, the agency did not make a finding that notice and comment were "unnecessary, or contrary to the public interest." *Compare* Pet. 18 *with* 39 Fed. Reg. 15139.

21. TECA noted that "a mere recital of good cause does not create good cause" and examined the reasonableness of the agency's good cause determination. The court applied its prior holding in *Nader* v. *Sawhill,* 514 F.2d 1064, 1068 (TECA 1975) and held that "a desire to provide immediate guidance, without more, cannot suffice for good cause", for to allow such "conclusory statements" to exclude the public from participation in the rulemaking would create an exception "that would swallow the rule." Pet. App. 31a-32a.

the Stabilization Act was not so unexpected as would have precluded advance notice." Pet. App. 32a. That factual finding was plainly compelled by the record[22] and consistent with the decided cases, *see United States Steel Corp.* v. *EPA*, 595 F.2d 207 (5th Cir. 1979); *Sharon Steel Corp.* v. *EPA*, 597 F.2d 377 (3d Cir. 1979); *Shell Oil Co.* v. *FEA*, 527 F.2d 1243, 1248 (TECA 1975).

Both courts below also found that there was an alternative reason why the expiration of the ESA could not justify the agency's dispensing with rulemaking proceedings. The April 30 amendment was not required by the ESA's expiration but was instead a policy decision by the agency. Pet. App. 10a, 32a. *See* discussion *supra* at 11-13. TECA's conclusion that such a decision was subject to rulemaking proceedings was correct, especially since "with the consideration that is the necessary and intended consequence of such procedures, [the agency] might have decided that a different accommodation was more appropriate." *Chrysler Corp.* v. *Brown, supra,* 441 U.S. at 316.

Respondent submits that these factual findings of the court of appeals, compelled by the record, do not warrant review. Nor does petitioners' contention that the courts below improperly engaged in *de novo* review and "should have limited their scope of review to whether a reasonable basis existed for the agency's 'good cause' determination". Pet. 19. As we have shown, both courts first examined

22. The allocation regulations adopted by the agency in January 1974 as a result of the December 1973 rulemaking, unlike the pricing regulations, reflected only authority granted by the EPAA. The agency was aware then of the difference in scope between the EPAA and the ESA since it specifically excluded from allocation coverage the products which were subsequently decontrolled for pricing purposes on April 3. *See* 10 C.F.R. § 211.1(b)(3), 39 Fed. Reg. 1924, *et seq.* (1974). In addition, the agency was on notice of the ESA's expiration for a full year. *See* Pub. L. No. 93-28, 87 Stat. 27 (1973).



the reasonableness of the agency's contemporaneous "good cause" determination and found it inadequate. Although they might properly have ended their inquiry at that stage,[23] they nevertheless examined the reasons advanced after the fact by the agency in support of its "good cause" determination. Since the agency had not relied upon those reasons at the time, the courts' review was necessarily *de novo*. Having itself urged that such a review be undertaken, the agency can hardly claim that TECA's doing so warrants review by this Court.[24]

TECA and the district court were also compelled to reject the agency's *post hoc* argument that the April 30 amendment was an interpretive rule not subject to 5 U.S.C. § 553.[25] Linguistically, of course, the contention is absurd, for it argues that the agency may "interpret" the term "covered products" to mean "covered products and all products refined from crude oil other than covered products." More importantly, as we have previously shown, the April 30 amendment "was definitely a substantive change in the price regulation framework." Pet. App. 31a n.8. Since the agency itself admitted the amendment was "sub-

23. The principle that an agency's action must be judged "solely by the grounds invoked by the agency" is well accepted. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947). *See also, e.g., Investment Co. Institute v. Camp*, 401 U.S. 617, 628 (1971); *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168-69 (1962); *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943); *Ashland Oil, Inc.* v. *FTC*, 548 F.2d 977, 981 (D.C. Cir. 1976).

24. The agency argued below that "a court may go beyond the agency's published justification and uphold the procedural validity of a regulation," Br. at 32 n.16.

25. Petitioners' suggestion that the decision below conflicts with *Mitchell* v. *Edward S. Wagner Co.*, 217 F.2d 303 (2d Cir.), *cert. denied*, 348 U.S. 964 (1954) and similar decisions (Pet. 20-21 & n.14) is unsound. This case, like each of those cases, turns upon the particular facts surrounding the regulatory system and the rule claimed to be "interpretive."

stantive in its effect," R. at 414, and since it substantially altered refiners' rights and obligations, it was clearly not interpretive.[26]

## IV.

### Petitioners' Assertion That Subsequent Rulemakings Regarding Other Regulatory Issues Cured the Agency's Violations Is Without Merit and Review Is Unwarranted

In an eleventh hour attempt to avoid the consequences of its disregard of both the substantive and procedural prerequisites for lawful rulemaking, the agency argued for the first time in TECA that subsequent rulemaking proceedings, unrelated to the issues presented by the April 30 amendment, cured the amendment's deficiencies. Although the court of appeals might have refused to entertain such new issues and arguments[27], the court ruled upon the issue over Mobil's strenuous objections. *See* Pet. App. at 36a n.10.

TECA correctly rejected the agency's contentions for two reasons, neither of which merits this Court's review. First, 5 U.S.C. § 553 requires the agency to provide for notice and comment prior to the promulgation of a rule, not after it has been adopted. Pet. App. 35a n.9, 37a n.11. The principle is both well settled and soundly based:

> Provision of prior notice and comment allows effective participation in the rule making process while the decision maker is still receptive to information

26. *See Chrysler Corp.* v. *Brown, supra,* 441 U.S. at 302 (alteration of rights and obligations is an "inherent characteristic" of substantive rules).

27. *See, e.g., Singleton* v. *Wulff,* 428 U.S. 106, 120 (1976) ("of course, . . . a federal appellate court does not consider an issue not passed upon below"); *Miller* v. *Avirom,* 384 F. 2d 319, 321-323 (D.C. Cir. 1967).



> and argument. After the final rule is issued, the petitioner must come hat-in-hand and run the risk that the decision maker is likely to resist change.

*Sharon Steel Corp.* v. *EPA,* 597 F. 2d 377, 381 (3d Cir. 1979); *accord, United States Steel Corp.* v. *EPA,* 595 F. 2d 207, 214-215 (5th Cir. 1979). *See also Maryland* v. *EPA,* 530 F. 2d 215, 222 (4th Cir. 1975), *vacated on other grounds,* 431 U.S. 99 (1977); *Standard Oil Co.* v. *DOE,* 596 F. 2d 1029 (TECA 1978).

Second, the simple fact is that petitioners did not and cannot point to any subsequent rulemaking in which the agency considered or allowed public commentary on a proposal relating to the issues involved in the April 30 amendment—whether product costs may properly be attributed by volume to the refinery residue exempted on April 3. Instead, petitioners invoke sweeping generalities regarding the scope of this case and then cite to subsequent rulemakings involving, *e.g.,* proposed amendments to the "special products" rule or the decontrol and allocation of costs to fuel oils. *See* Pet. at 11 & n.6. But as TECA recognized,[28] this case does not concern the validity of the special products rule, decontrol decisions or allocation of costs to fuel oils. It concerns instead a rule apportioning

28. *See* Pet. App. at 35a n.9, 37a n.11. Petitioners have asserted that TECA was unaware that the agency had subsequently amended the allocation formula. Pet. 25. That is incorrect, for TECA expressed its awareness of "subsequent [ ] rulemakings concerning modification of the V factor and other allocation and cost formu' s". Pet. App. 35a n.9. Nor did TECA err in noting that the regulatory amendments adopted on December 5, 1974 concerned non-product costs only. *See* Pet. 25. Although the September notice invited comments respecting amendments to the "special products" rule which are not relevant here, the agency itself expressly stated that the amendments adopted as a result of that notice on December 5, 1974 concerned only non-product costs. 39 Fed. Reg. 42368 (1974).

costs to refinery residue volumetrically. The record below showed that the agency never considered the impact of that rule and never complied with the commard of Congress to allow public participation in the decision to implement such a rule. TECA was plainly correct in finding that the agency's obedience to statutory requirements in promulgating other rules involving other products and implicating different issues did not alter the fact that it had failed to do so with respect to the only rule at issue in this case—the April 30 amendment. Petitioners have advanced no reasons why TECA's findings warrant review in this Court.

## V.

## The Argument Raised For the First Time In the Petition Does Not Warrant this Court's Review

Rather than limiting themselves to the questions presented to the district court and the questions they first raised in the court of appeals, petitioners devote a substantial part of the petition to a new explanation of the agency's actions, asserting for the first time that the April 30 amendment was a "continuation" of the rulemaking proceedings which ended on January 14, 1974. Pet. 14-17 & n.17. They seek to have this Court review the arguments advanced under counsel's new theory, even though the issues were neither presented to nor decided by either court below and even though there are no "exceptional circumstances" which justify such review. In any event, petitioners' belated theory is wholly lacking in merit, founded as it is upon a substantial mischaracterization of both the April 30 amendment and the agency action in its promulgation as well as a serious misstatement of the authorities upon which the argument rests.



### A. This Case Does Not Present the Exceptional Circumstances Which Warrant Departure From Accepted Appellate Practice

It is of course a long established rule that "[o]nly in exceptional circumstances will this Court review a question not raised in the court below." *Lawn* v. *United States,* 355 U.S. 339, 362-63 n. 16 (1958).[29] Rather than implicating "exceptional circumstances" which would justify departure from the settled rule, application of that rule is especially appropriate in this case.

A necessary foundation for petitioners' new argument that the April 30 amendment was a "continuation" of the January 14 rulemaking is the factual assertion that the agency believed it was continuing the prior rulemaking and its substantive and procedural failures were therefore justified. It is also dependent upon the claim that in December 1973 the agency intended to adopt the rule established on April 30. Surely, where such facts are solely within its control, the agency is obliged to inform the courts and the parties of the basis for and intent of its action. Although it submitted in excess of 550 pages of briefs and exhibits to the district court and raised two new arguments in the court of appeals, the agency never offered the "continuation" explanation in either court. As one court has noted in examining the sound policies supporting rejection of new arguments upon appellate review, the rule "requires [the parties] to deal fairly and frankly with each other and with the trial tribunal." *Miller* v. *Avirom,* 384 F.2d 319, 322 (D.C. Cir. 1967). If petitioners' present explanation

29. *See also, e.g., United States* v. *Lovasco,* 431 U.S. 783, 788 n.7 (1977); *Ramsey* v. *United Mine Workers,* 401 U.S. 302, 312 (1975); *Adickes* v. *S.H. Kress & Co.,* 398 U.S. 144, 147 n.2 (1970); *Neeley* v. *Eby Construction Co.,* 386 U.S. 317 (1967); *Duignan* v. *United States,* 274 U.S. 195, 200 (1927).

of the basis for the agency's actions is accurate, the agency's refusal to reveal that basis before now was a gross disservice to respondent and both courts below.[30]

Respondent submits that a new argument raising fact issues uniquely within the control of petitioners and contrary to petitioners' representations to both courts below is not worthy of this Court's attention.

**B. Petitioners' New Argument is Without Merit**

Apart from the fact that it is not properly before the Court, the "continued rulemaking" argument lacks substantive merit.

Petitioners' position is dependent upon their assertion that the April 30 amendment was nothing more than a necessary corollary to prior regulations. Pet. 8, 18. As previously shown, however, the April 30 amendment was not necessary. It was instead a policy decision which resulted in a substantial departure from the January 14 regulations as proposed in December of 1973. Since the

30. Petitioners concede that their "continued rulemaking" argument was not raised below, but assert that "the agency did advance arguments directly supporting that analysis." Pet. 17 n. 13. To the contrary, petitioners' present argument is inconsistent with their position below. For example, the agency expressly admitted below, and the regulatory preamble stated, that the April 30 amendment was enacted *without* prior notice because "good cause" existed. In their answer to Paragraph 23 of the Amended Complaint, petitioners stated: "Defendants admit that the April 30, 1974 amendment . . . was enacted without prior notice." R. 83. Contrary to their prior representations, petitioners now assert that such notice had been provided in December 1973 and "a second, duplicative notice . . . was not required." Pet. 17. Similarly, although the agency conceded below that it had not considered all of the statutory objectives (arguing that such consideration was not required), in its petition the agency has for the first time asserted that such prior consideration took place. Pet. 17. The agency's argument below that the April 30 amendment interpreted the January 14 regulations is similarly inconsistent with its present assertion that the amendment was in fact part and parcel of the January 14 regulations.



April 30 rule was substantially different from both the December 1973 proposal and the January 14 regulations, that prior rulemaking did not and could not provide the notice and comment period required by statute.

As noted previously, it is axiomatic that an agency's actions must be judged by its own contemporaneous conclusions, not by appellate counsel's rationalization after the fact.[31] In this case, the agency never stated that the rulemaking proceeding which closed on January 14 would continue nor did it state that the April 30 amendment was part of a continued rulemaking. Petitioners' new argument is not only unsupported by the contemporaneous record, the record contradicts it. For example, petitioners' assertion that the April 3 and 30 amendments were an intended "continuation" of the January 14 regulations is expressly contradicted by the agency's unequivocal statement at that time that "no specific future changes are currently anticipated." 39 Fed. Reg. 1924 (1974). Although the agency has evidenced its ability to state expressly that regulatory amendments were "corrective" and therefore part of the original rulemaking (40 Fed. Reg. 39849 (1975)), it did not do so here, relying instead on the "good cause" exception in 5 U.S.C. § 553. Similarly, petitioners argue that the April 30 amendment was part of the agency's "original intent" in January 1974. The rulemaking record, however, reveals that on January 14 the agency was well aware of the difference in scope between the ESA and EPAA[32] and fully intended to exercise pricing authority under both acts

31. *E.g., Investment Co. Institute* v. *Camp,* 401 U.S. 617, 628 (1971); *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156 (1952).

32. *See* discussion, *supra,* at n. 22.

until the expiration of the ESA.[33] Having never intended to narrow the scope of the pricing regulations in January 1974, petitioners cannot now claim that the agency then intended to adopt what they characterize as a "corollary" to that reduction in scope.

Even if petitioners could clear these factual hurdles, their "continued rulemaking" argument is not supported by the authorities upon which they rely. It is true that in *American Trucking Associations* v. *Frisco Transportation Co.*, 358 U.S. 133 (1958), this Court held that the ICC may reopen its proceedings to correct an inadvertent error. The Court held, however, that the agency's power to correct its inadvertence "may only be exercised after proper opportunity for notice and hearing." 358 U.S. at 144-45. Here, the agency provided no such opportunity. Moreover, in *American Trucking* the Court held that the power to correct inadvertent ministerial errors may not be used to "execute a subsequently adopted policy." 358 U.S. at 146. As previously shown, the April 30 amendment reflected a policy decision by the agency which substantially altered the preexisting regulatory framework.

Finally, *American Trucking* is distinquishable on its facts. In that case the record showed that the agency previously considered and affirmatively decided to adopt a policy which, due to clerical error, was not expressed in its final decision. Here, in contrast, petitioners offer no record support and admit that the agency "failed to consider" the implications of the April 30 and April 3 amend-

33. *See* 39 Fed. Reg. 12354 (April 5, 1974) ("The FEO has regulated the prices of these products pursuant to both [the ESA and the EPAA]"). Indeed, the notion that the agency intended to adopt the April 30 amendment in January borders on the frivolous. In January FEO did nothing more than republish and renumber the CLC regulations which had previously been incorporated by reference. *See* 39 Fed. Reg. 1924; 39 Fed. Reg. 744 (1974).



ments in January of 1974. Pet. 16. Surely, an agency may not be permitted to disregard the statutory requirements that objectives be considered and public participation be provided merely because, prior to that time, the agency "had failed to consider" the rule it intends to adopt.

Petitioners have also seriously misstated the holding in the second authority upon which they rely, *California* v. *Simon,* 504 F.2d 430 (TECA), *cert. denied,* 419 U.S. 1021 (1974). Petitioners state that

> "*Simon* specifically held that the January 14 regulation contemplated follow-up clarifying amendments and that a subsequent amendment was part of the same rulemaking proceeding so that the agency did not have to provide new notice and opportunity for comment." Pet. 17n.13.

That statement is manifestly untrue. *Simon* neither involved a rule promulgated without notice and comment nor a follow-up clarifying amendment to the January 14 regulation that was part of that rulemaking. To the contrary, *Simon* concerned a regulation which had been proposed by the CLC on October 25, 1973 and subsequently adopted on February 21, 1974. 38 Fed. Reg. 29618, 39 Fed. Reg. 8996, 504 F. 2d 432, 434. The question presented was whether the January 14, 1974 regulation had *sub silentio* closed the earlier rulemaking and the court held only that it had not. The *Simon* court certainly did not find that the January 14 regulation contemplated follow-up amendments as petitioners assert, since it quoted from that regulation's preamble that "no specific future changes are currently anticipated." 504 F.2d 434.

Finally, even if petitioners' new argument had a basis in the authorities or the facts, the deficiencies in the promulgation of the April 30 amendment still would not be cured.

Having stated that it inadvertently "failed to consider" the nature of the amendment in January 1974 (Pet. 16), the agency cannot simultaneously argue that in January 1974 it determined that such an amendment would implement the EPAA objectives. Moreover, given its admission of an allegedly inadvertent lack of knowledge or publication of such a rule, the agency cannot simultaneously argue that it gave prior notice of the rule in December 1973. The simple fact is that the agency did not give notice or consider the consequences of the amendment in December 1973, January 1974 or April 30, 1974.

We submit that the agency's newly discovered "continued rulemaking" argument has been improperly presented to this Court, is lacking in substantive merit, is contrary to the facts of record and does not warrant review by certiorari.

## VI.

## Petitioners Have Mischaracterized The Consequences Of The Decision Below

Petitioners argue that review is warranted because the decision below implicates vast sums which refiners may attempt to recover by increasing gasoline prices. Pet. 27-28. Notably, petitioners do not assert that prices will in fact be affected and, as shown below, that result is unlikely.

With respect to the sums themselves, we believe that advocates' zeal has led to significant exaggeration. Neither respondent nor this Court, however, can presently assess the accuracy of petitioners' unsupported estimates, for neither the methodology nor the facts upon which they are based have been divulged. Certainly a petitioner's wholly unsupported and unexplained assertions regarding the



monetary consequences of a decision ought not provide a basis for review.

If such sums were indeed involved, it ill behooves the agency to argue that its action need not achieve the "fairness and mature consideration" assured by APA procedures or that it need not have carefully considered the statutory objectives. Petitioners' estimates, if correct, would merely reinforce the conclusion that the unanimous decision below is correct. Here, of course, the sums involved are not profits, but costs incurred by refiners which, as the uncontroverted record below showed, Mobil was required to absorb under an ill-considered and procedurally defective regulation. Moreover, any decision affecting the petroleum industry as a whole will have potentially substantial economic consequences but surely that fact alone does not mean that any particular case warrants consideration by certiorari. Where, as here, no substantial legal questions are raised and the record compellingly supports the findings of fact of both courts below, certiorari is inappropriate.[34]

Although we are incapable of assessing the accuracy of petitioners' estimates, the impact upon consumers has been substantially distorted by the agency. Whatever the accurate figure may be, there is no realistic prospect that the sums at issue will affect gasoline prices in the near term, if at all. The 29 largest refiners alone already have available "banks" of unrecovered costs of $5 billion which cur-

34. If the petition were granted and the decision below reversed, the economic result for which petitioners urge review would not be accomplished. TECA would then be obliged to determine whether the district court was correct in finding that the April 30 amendment contravened the statutory requirement for a dollar-for-dollar passthrough, a decision respondent submits was compelled by the record of the amendment's impact upon Mobil. Further, both courts below may find the rule lacks a rational basis and contravenes the statutory objectives. *See* discussion *supra* at 16.

rent market conditions prevent from being passed through in actual prices.[35] Effective March 15, 1980, the President imposed a "conservation fee", the net effect of which is to increase the retail price of gasoline by 10 cents a gallon.[36] That increase will further impede refiners' ability to recover banked costs in the marketplace.[37] Indeed, it is passing strange for petitioners to argue that the decision of the court of appeals may weaken the nation's attempt to fight inflation by allowing gasoline price increases when the President has found that such increases are presently in the national interest.

Petitioners' assertions with respect to the impact of the decision below on the agency's enforcement program (Pet. 28.) are equally speculative and unfounded. Their contention is dependent upon the unjustified presumption that the agency will prevail in each of its "hundreds of pending actions." *Id.* To the extent it does not prevail, TECA's decision will have no impact whatsoever on the enforcement program. We submit that there is no reasonable basis for

35. DEPARTMENT OF ENERGY, ECONOMIC REGULATORY ADMINISTRATION, MONTHLY ENERGY REVIEW 81 (Feb. 1980). It is likely that the numerous smaller refiners also have substantial preexisting banked costs, further reducing the possible effect of TECA's decision upon consumers' prices.

36. *See* 345 Energy Users Report (BNA) at 15-17 (March 20, 1980).

37. Petitioners' argument that the possibility that gasoline will be decontrolled in September 1981 provides an incentive for current cost recovery (Pet. 28) is unsound. If, upon decontrol, refiners will be able to fully recover their costs in the marketplace, there is no need or incentive to do so presently. Moreover, given the size of existing banks and the impact of the "conservation fee", it is improbable that refiners will be able to eliminate their banks prior to decontrol.



such a presumption. There is, moreover, no arguable public interest in permitting the agency to allege violations of law founded upon rules which the agency itself has promulgated in arbitrary disregard of both substantive and procedural requirements. Petitioners' overstated speculation respecting the consequences of the decision below ought not provide a basis for the writ requested.

Finally, we believe that petitioners' assertion that TECA's decision will deter agencies from taking prompt action where the "public interest overrides the need for notice and comment" (Pet. 29) simply ignores what the courts below held. Here, there was not even an arguable basis for believing that any "public interest" supported the agency's actions. The public interest was in ensuring that the agency engage in reasoned decisionmaking and provide the minimum essential rights and procedures set out in the APA. The decision below does no more than encourage agencies to provide the fairness and mature consideration required by Congress.

## Conclusion

The decision below applied settled law to the particular facts of this case and arrived at a just result. No important issues of law warranting review by this Court are presented by that decision or the new argument raised in the petition. The petition should accordingly be denied.

Respectfully submitted,

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